ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5074
MINORITY (202) 225–5051
TTY (202) 225–6852

August 12, 1999

BY FACSIMILE
The Honorable Carol M. Browner
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Browner:

Thank you for the Environmental Protection Agency's (EPA's) July 23, 1999 letter responding to my letter of June 30th about EPA's interpretation of the Knollenberg provision in the 1999 VA-HUD Appropriations Act and other issues raised in the May 20th joint House-Senate hearing on the Clinton Administration's compliance with recent statutory requirements governing global climate change policy.

EPA's July 23rd letter clarifies that the Clean Air Partnership Fund may not be used to support grassroots lobbying efforts. However, it does not resolve the issue of whether EPA regards the Knollenberg provision as permissive or prohibitive.

EPA's July 23rd letter states that, "the Administration does not believe the Knollenberg amendment is, in your words, 'a practical nullity.' Rather, the Administration believes the amendment is unnecessary, because EPA is not attempting to implement the Protocol prior to ratification." However, other statements and actions by EPA imply that the Knollenberg provision is a porous barrier to Kyoto-inspired programs, initiatives, and discretionary regulatory activities.

EPA's interpretation, as set forth in its February 18th Office of General Counsel draft summary, is that "EPA may expend funds to issue a regulation for a number of purposes including the reduction of greenhouse gas emissions, as long as the expenditures are in implementation of existing law and not for the purpose of implementing, or in preparation for implementing, the Kyoto Protocol." In essence, EPA argues that it may use existing regulatory authority to accomplish the purposes of the Kyoto Protocol as long as such regulation does not implement the Kyoto Protocol. But, this is semantic hair-splitting – the assertion of a distinction without a difference.

For the Knollenberg provision to be a constraint as intended, the test of EPA's compliance cannot simply be whether EPA is implementing "existing law." After all, every rule EPA proposes or issues is presumably for the purpose of implementing existing law (unless the rule is overturned or suspended in court, as in the recent National Ambient Air Quality Standards decision). The real issue is whether EPA is using, or intends to use, existing statutory and regulatory authority to implement the Kyoto Protocol while claiming to address other issues or pursue other objectives.

It was in order to clarify exactly what EPA believes is or is not prohibited by the Knollenberg provision that Senator Nickles and I, in our May 27th letter, posed the following questions: "If EPA were implementing the Kyoto Protocol *under the guise* of existing law, how would anybody outside the agency know? Are there any criteria that would enable Congress to distinguish innocent actions (those that incidentally accomplish the purposes of the Kyoto Protocol) from prohibited actions (those that implement the Kyoto Protocol)?" EPA's June 23rd letter simply evaded that question: "The Administration has committed not to implement the Kyoto Protocol .... Thus, we believe that statutory language restricting spending is unnecessary." I regret to say that EPA's July 23rd letter continues to evade this question even while denying any intention to be evasive.

In the hope of moving this discussion forward, I will now offer a reading of the Knollenberg provision that supplies criteria for distinguishing between permissible and prohibited actions. It is a reading, moreover, that Congressman Knollenberg endorsed at the May 20th joint hearing.

As I read the Knollenberg provision, EPA may not propose or issue regulations, or enter into consent decrees, that would have the effect of limiting emissions of carbon dioxide and other greenhouse gases covered under the Kyoto Protocol unless such regulations are specifically required by law. The key concept here is the distinction between *mandatory* and *discretionary* actions.

Some regulations that may be required by current law may also incidentally reduce emissions of carbon dioxide and other greenhouse gases. The Knollenberg provision does not limit regulations of that kind. Such regulations are clearly not "for the purpose of implementing ... the Kyoto Protocol," however much these regulations may also have the effect of reducing greenhouse gas emissions. The situation is quite different, however, in the case of greenhouse gas-reducing regulations that are discretionary, i.e., not specifically mandated by existing law. Congress is entitled to presume that any such regulation is Kyoto-inspired. Unless EPA can disprove that presumption, the rule conflicts with the Knollenberg provision and, thus, is prohibited.

The only exception may be for discretionary regulations that are also necessary to reduce an imminent threat to public health and safety. If a discretionary rule is needed to address an imminent threat to public health and safety, then the proposal or issuance of the rule is also not "for the purpose of implementing ... the Kyoto Protocol," even if the rule has the effect of reducing greenhouse gas emissions. However, any action of this nature must go through the public notice and comment process before its *bona fides* as a non-Kyoto-inspired rule can be assured.

This reading of the Knollenberg provision squares with common sense. Although the Knollenberg provision does not prohibit EPA from carrying out any mandatory requirements of existing law, it cannot be understood as permitting EPA to do everything it otherwise has discretion to do under existing law. For, in that case, the provision would say no more than that EPA's actions must be legal – a superfluous requirement, since all proposed rules must be justifiable under existing law.

To put this another way, the Knollenberg provision cannot be understood as requiring complete candor on the part of EPA officials in order to be enforceable. The whole point of the provision is to prevent stealthy ("backdoor") efforts to implement a non-ratified treaty. Yet, under EPA's interpretation, any greenhouse gas-reducing regulation, even if intended to implement the Kyoto Protocol, is permissible as long as the treaty is never mentioned in the administrative record accompanying the rulemaking or public statements describing it. Congress under its Congressional Review Act authority and the Office of Management and Budget under its regulatory review role must have an independent basis for determining whether any greenhouse gas-reducing regulation proposed or issued by EPA is or is not in compliance with the Knollenberg provision. Otherwise, the Knollenberg provision is unenforceable, and Congress cannot be supposed to have enacted an unenforceable restriction.

In summary, if the Knollenberg provision is to bar Kyoto-inspired regulation without impeding agency actions specifically mandated by law, and, if its enforcement is not to depend on the candor of the very officials whom the provision is intended to constrain, then the provision must be understood as limiting EPA's discretionary authority with respect to all Kyoto-covered gases.

I welcome EPA's comments on my reading of the Knollenberg provision. Therefore, pursuant to the Constitution and Rules X and XI of the House of Representatives, I request that EPA's Office of General Counsel assess the argument, presented above, that the Knollenberg provision limits EPA's discretionary authority to propose or issue rules, regulations, decrees, or orders that may have the effect of reducing emissions of carbon dioxide and other greenhouse gases.

EPA's response should be delivered to the Subcommittee office in B-377 Rayburn House Office Building by Wednesday, September 1, 1999. If you have any questions about this request, please contact Staff Director Marlo Lewis at 225-1962. Thank you in advance for your attention to this matter.

Sincerely,

David McIntosh

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources and Regulatory Affairs

cc: The Honorable Don Nickles
The Honorable Larry Craig
The Honorable Frank Murkowski
The Honorable Jeff Bingaman
The Honorable Dan Burton
The Honorable Dennis Kucinich
The Honorable Joe Knollenberg